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Evidence--Admissibility of Testimony of Physician Retained Solely as a Witness

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EVIDENCE—ADMISSIBILITY OF TESTIMONY OF PHYSICIAN RETAINED SOLELY AS A WITNESS.—*P* brought this action against *D* supermarket for injuries allegedly sustained from an illegal search. One of *P*'s witnesses was a physician who testified to his medical opinion of the *P*'s condition based on the subjective symptoms as related to the physician by *P*. The court could not determine from the record whether the doctor examined *P* in order to become a favorable witness for *P*, or whether he examined *P* for the purpose of treating her. *Held*, a physician who is brought into a case for the sole purpose of becoming a witness may not testify as to symptoms given him by the patient. *Sutherland v. Kroger Co.*, 110 S.E.2d 716 (W. Va. 1959).

It has long been recognized as an exception to the hearsay rule that a doctor may competently testify to his medical opinion based on the subjective symptoms where there exists a doctor-patient relationship established where treatment was the paramount objective. *Meany v. United States*, 112 F.2d 538 (2nd Cir. 1940); *Rasmussen v. Metropolitan Cas. Ins. Co.*, 264 Wis. 432, 59 N.W.2d 457 (1953); MCCORMICK, EVIDENCE § 266 (1954).

The theory underlying this exception is that when a person goes to a physician for the primary purpose of obtaining the correct diagnosis and the proper treatment necessary for a return to normal health, such person will intuitively present to the doctor as accurate a picture of the facts as can be possibly recalled. The desire to "get well" induces a person to make a conscious effort to recollect all the facts and symptoms of the injury. No such desire guides the tongue of those seeking legal rather than medical recovery.

On the other hand, when one retains a physician solely for the purpose of retaining him as a favorable witness, certain facts are apt to be elaborated while others may be palliated. There is both opportunity and motive for a litigant to feign or exaggerate symptoms and conditions. Needless to say, in a case where the plaintiff's pain has been somewhat magnified, a physician's opinion will be more liberal, erronously indicative of a more grevious injury to the patient. The Supreme Court of the United States early recognized the invalidity of such testimony as hearsay in *Boston & Albany R. Co. v. O'Reilly*, 158 U.S. 334 (1895).

Courts of other states have delved more into the problem. The Illinois court in *Sanitary Dist. v. Industrial Comm.*, 343 Ill. 236, 175 N.E. 372 (1931), held that all the testimony rendered by a doctor

as a medical expert was incompetent if the doctor had not originally been retained for the purpose of treatment, and if his opinion was not based entirely on objective symptoms. The court here went further and said that such a physician's testimony was inadmissable if the history of the case was related to him by the plaintiff or by other physicians. By proper inference this opinion would seen to include also those facts and symptoms which a testifying physician would gather from a review of the hospital records. Thus the problem arises as to the admissability of an opinion formulated from such a review of hospital records. It is believed that most of the cases reviewed would not go as far as the Illinois case mentioned. As indicated in *United States v. Matory*, 71 F. 2d 798 (7th Cir. 1934), a physician may competently testify when he bases his opinion on a physical examination and facts disclosed in hospital records concerning the case. Any other decision would severely limit the use of medical experts by the litigants in a controversy.

Most jurisdictions considering the problem of the principal case hold that where the opinion of a doctor is based only on a comparatively small part on facts related to him by the plaintiff; such opinion is inadmissable where the examination is made for the purpose of qualifying the practitioner as a medical witness, no matter where the other facts in regard to the plaintiff's condition were obtained. *Tillman v. Stanley Iron Works*, 222 Minn. 421, 24 N.W. 2d 903 (1946); *Cooper v. Seaboard Airline R. Co.*, 163 N.C. 150, 79 S.E. 418 (1913).

In the excellent opinion of *Devore v. Schaffer*, 245 Iowa 1017, 65 N.W. 2d. 553 (1954), the court acknowledged that although a physician who actually treats a patient may testify to what the plaintiff told him as the basis from which he arrives at his opinion on the patient's condition, a physician, who examines the person for no purpose other than to become a witness in his behalf, may not testify either to the statements made by the injured to him or to an opinion based on such statements. Such statements are mere hearsay, unsupported by the oath of the litigant and not otherwise tested in adversary proceedings.

Although the aforementioned jurisdictions and others are generally in accord with the decision rendered in the principal case, still there are some jurisdictions which are apparently contra. Despite the authority of *Chicago & N.W. R. Co. v. Garwood*, 167 F.2d 848 (8th Cir. 1948); *United States v. Roberts*, 62 F.2d 594 (10th Cir. 1932); and the previously mentioned federal cases, two

federal district courts have reached opposite results. In *Putney v. United States,* 4 F. Supp. 376 (D.C.Colo. 1933), the court held that such testimony was competent and of some value, but added that such evidence must be weighed in light of the factors surrounding it. This district, although allowing such testimony, apparently did not give much credence thereto. *Campbell v. Pittsburgh & West Virginia R. Co.,* 122 F.Supp. 749 (W.D.Pa. 1954), also acceded to the contrary rule, but cited little authority for so doing.

Of the state courts which have ruled on this question contra to the principal case, two of these, Ohio and Kentucky, have conflicting opinions. Despite the early case of *Illinois Central R. Co. v. Townsend,* 206 Ky. 329, 267 S.W. 161 (1924), which denied admissability of such testimony, the more recent case of *Mary Helen Coal Corp. v. Bigilow,* 265 S.W.2d 69 (Ky. 1954), allowed such evidence to be introduced. In the latter case the court attempted to distinguish the prior cases on the ground that although a physician, when retained solely as a witness, may testify to his opinion of the plaintiff's condition where the opinion is based in part on symptoms related to him by the plaintiff, the doctor cannot relate the statements or acts of the plaintiff in order to bolster his statement. The court pointed out that such statements or acts are merely voluntary with no basis of truthfulness of the plaintiff. So in Kentucky it would appear that a doctor may testify to the effect, but not to the supposed cause, of an injury, since the cause may be untrue.

Ohio apparently has an even split of cases on the subject, with four following the view expressed in the principal case and four adhering to the contra view. The most recent Ohio case, *DiMarzo v. Columbus Transit Co.,* 100 Ohio App. 521, 60 Ohio Ops. 404, 137 N.E.2d 766 (1957), did not attempt to reconcile the prior Ohio decisions, but upheld the admissability of such evidence since the information on which the testifying physician had based his opinion had been presented to the jury.

A comprehensive review of the cases which are contra to the principal case is found in *Waldroop v. Driver-Miller Plumbing & Heating Corp.,* 61 N.M. 412, 301 P.2d 521 (1956). This case collected decisions from other states and reasoned therefrom that any doctor must found his diagnosis on both objective and subjective symptoms in order to express an intelligent opinion on the injury at hand. The court further acknowledged that it is necessary for a

doctor to be well informed about the subject in both treating and testifying. Since an equal amount of knowledge of the injury is necessary in either case, the New Mexico court echoed the other contra cases in saying that they failed to see how any harm could be done by the fact that the examination was not made for the purpose of treatment. The fact that a man's viewpoint as to the magnitude and grevousness of his injury can well shift when that person seeks legal rather than medical relief was ignored or vitiated by this court.

Regardless of the contra holdings, it is believed that the West Virginia supreme court has reached a sound and meritorious decision in the principal case. Granted that the opposite parties in litigation will still use physicians who are either liberal or conservative in answering hypothetical questions based primarily on the plaintiff's alleged condition, still these questions must have a foundation in facts in evidence in order for the jury to make a causal connection between the injury and any answer to these questions, and, therefore, the opportunity for fabricated or exaggerated claims will be greatly lessened.

L. O. H.

INCOME TAX—FAIR MARKET VALUE OF OVERRIDING ROYALTY INTEREST—IMPLIED RESERVED ECONOMIC INTEREST.—Taxpayers sold shares in one corporation for cash and an overriding royalty interest. The cash received in excess of what the shares had cost was declared on their return as capital gain. The amounts received from this overriding royalty had for years after the sale been declared as ordinary income by the taxpayers. They now seek a refund on the basis that the income was not ordinary but was long term capital gain. *Held*, the fact that they received the overriding royalty interest as part of the sale price of the property is irrelevant. Such an overriding royalty is a property interest, and therefore, the question of whether it must have a fair market value need not be considered. Income received by the owner of a property interest is taxable to him as ordinary income rather than as a capital gain. *Warren v. United States*, 171 F.Supp. 846 (1959).

Courts may generally treat the acquisition of an overriding royalty by a vendor in a transaction in three distinct ways.

1. They may consider it as part of the entire consideration paid to the vendor, and by reducing it to its fair market value, combine